However, at the creditors' meetings, despite the respondent's objections, it may be outvoted by the majority of the other creditors and once the scheme is before the court again for its approval and sanction, the court is most reluctant to hold a scheme as being unreasonable as it is greatly influenced by the size of the majority vote and it has been held in the case of *Re English, Scottish and Australian Chartered Bank*[1] that the court should only overrule the decision of the majority if there has been some material oversight or miscarriage on their part. Thus the applicant is left with little or no effective recourse once the order under s 176(1) is made. It is at the summary stage of the proceedings that the court must be vigilant to ensure that all the requirements of s 176(1) are met and for this very reason, I consider that it is not right and proper to shut out the respondent from expressing its misgivings to the scheme that is now under review. I must also add that had the same objections been raised before me on 6 July 1989, I would not have granted the order in the first place. In this respect, I treat this application as similar to that of an application to set aside an interim injunction obtained ex parte, which incidentally also forms part of the order I had granted on 6 July 1989.

For the very reasons that I have expressed, I allow the respondent's application with costs and that the ex parte order dated 6 July 1989 be set aside. I also need to stress that this order should not prevent the applicant from introducing another proposal acceptable to all its creditors, especially the respondent.

Application allowed.

Solicitors: *Cheang & Ariff; Chooi & Co.*

Reported by *PS Ranjan*

Supreme Leasing Sdn Bhd v Dior Enterprises & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C23-1083-86
VC GEORGE J
10 AUGUST 1989

Civil Procedure — Summary judgment — Whether application was lacking — Verification of facts in supporting affidavit — Whether rules required proving of facts — Rules of the High Court 1980, O 14 r 2

The plaintiff claimed for sums owed by the first defendant arising out of a cheque discounting facility agreement and by the second, third and fourth defendants under a guarantee and indemnity dated 11 March 1982. The plaintiff took out an O 14 application against the defendants supported by the affidavit of the plaintiff's operations manager. This affidavit adhered closely to the form of supporting affidavit of an O 14 application prescribed by the Rules of the High Court 1980. The deponent also exhibited a copy of the letter that contained the terms and conditions of the cheque discounting facility between the parties as well as a copy of the letter of guarantee. He also stated that the first defendant had sent a letter dated 15 January 1985 in which he had admitted the debt. The defendants contended that the O 14 application was lacking in that there had not been a verification of the facts on which the claim was based. Judgment was given and the defendants appealed with the issue, inter alia, being the effect and the extent of the requirement in an O 14 application that the plaintiff verify the facts on which the claim is based.

Held, dismissing the defendants' appeal:

(1) Verification of the facts in the context of O 14 r 2 is not to be understood to mean proving the facts. The plaintiff has in effect to swear to the truth of the facts on which the claim is based. It is not sufficient to swear that the amount claimed is owed. It is the cause of action that has to be verified and not the results or consequences of the alleged cause of action.

(2) The senior assistant registrar was justified in giving summary judgment as the first affidavit filed in support of the application met all the requirements presented by O 14.

Cases referred to

1 *Murphy* v *Nolan* 18 LR (Ireland) 468 (folld)
2 *M'Conville* v *Nolan* 17 Ir LT Rep 24 (not folld)

William Leong for the plaintiff/respondent.
V Chandran for the defendants/appellants.

Cur Adv Vult

VC George J: In this appeal, inter alia, the effect and the extent of the requirement in an O 14 application that the plaintiff verify the facts on which the claim is based, was considered. By the statement of claim, the plaintiff had contended that, pursuant to a cheque discounting facility agreement, the plaintiff had to purchase the first defendant's customers' cheques 'upon terms and conditions set forth in a letter dated 11 March 1982'. It was also averred that the first defendant had agreed to pay interest at the rate of 3% per mensem on the amount represented by

dishonoured cheques from the date of maturity of the said cheques until full settlement. The plaintiff then went on to contend that the second, third and fourth defendants had by a 'guarantee and indemnity dated 11 March 1982 agreed to guarantee and indemnify the plaintiff against all losses, damages and expenses which the plaintiffs may suffer'. The statement of claim ended with a statement of the amount said to be owing as principal and as interest as at 28 February 1986 which, it was contended, had not been paid in spite of demands. Judgment for the said amounts was prayed for.

The plaintiff took out its O 14 application against all the defendants which was supported by the affidavit of the plaintiff's operations manager who on oath confirmed that the first defendant was 'justly and truly indebted to the plaintiff in the sum set out in the summons-in-chambers' and went on to state that the 'particulars of the said claim appear in the statement of claim filed herein'.

What the deponent was doing was to adhere closely to the form of the supporting affidavit for an O 14 application prescribed by the Rules of High Court 1980, the form being Form 18 thereof. The deponent went on to confirm, as is required by Form 18, that the amount claimed was still due and owing and that he verily believed that there was no defence to the action.

Although all aspects of the format set out in the prescribed Form 18 had thus been met, the deponent did not leave the affidavit at that but exhibited a copy of the letter that contained the terms and conditions of the cheque discounting facility between the parties as well as a copy of the letter of guarantee. He also stated that in fact the first defendant had sent a letter dated 15 January 1985 in which it had admitted the debt.

At the hearing before the senior assistant registrar, the defendants who had not filed any affidavit in reply had apparently contended that the O 14 application was wanting in that:

(1) the plaintiff had not exhibited the said letter that had been referred to in the operation manager's affidavit as being an admission of the debt;
(2) the plaintiff had not exhibited the cheques said to have been discounted;
(3) the plaintiff had not exhibited any statement of account between the plaintiff and the first defendant; and
(4) the plaintiff had not proven that the second, third and fourth defendants were partners.

Upon being confronted with this submission, counsel for the plaintiff had apparently sought and obtained an adjournment to file a further affidavit in order to exhibit the documents. A further affidavit was filed and after that one of the guarantors, who was a partner in the first defendant, filed an affidavit in opposition to the O 14 application. The point was apparently taken that the senior assistant registrar had no jurisdiction to allow the plaintiff to file a further affidavit (and presumably to read it at the continued hearing) and it was contended that without the further affidavit the position would have been that there had not been a verification of the facts on which the claim was based.

The learned senior assistant registrar apparently disagreed with the jurisdictional point and, having read the further affidavit, gave summary judgment as prayed against each of the defendants. The first defendant appealed. In chambers, I had allowed the appeal but having decided to and entertained further arguments in open court, I came to the conclusion that the appeal should be dismissed and it was so dismissed with costs.

Now, while the defendant is not obliged to file any affidavit in opposition to an O 14 application, he runs the risk of being accused of taking the plaintiff by surprise by not giving notice of the grounds on which he relies to have the O 14 application dismissed. Where one party is taken by surprise, he may be entitled to have the matter adjourned to take instructions and if necessary to file affidavits dealing with the points raised.

Order 14 r 2(1) provides that the affidavit in support of an O 14 application should do two things: (1) verify the facts on which the claim is based; and (2) state that the defendant has no defence. Verification of the facts in the context of O 14 r 2 is not to be understood to mean proving the facts. The plaintiff has in effect to swear to the truth of the facts on which the claim is based. It is not sufficient to swear that the amount claimed is owed. It is the cause of action that has to be verified and not the results or consequences of the alleged cause of action. What the verification has to amount to was explained in an old Irish case called *Murphy* v *Nolan*[1] where Lord Ashbourne said at p 470:

> Now, there is no question but that the affidavit in support of a motion for judgment must do two things — (1) verify the cause of action; and (2) state that the defendant has no defence. The contention here is that the cause of action was not sufficiently verified. The way the cause of action was verified was this:
>
> 'The defendant herein is indebted to me in the sum of $24.16s as per particulars specially indorsed on the writ of summons herein.'

The judge went on to refer to and distinguish the judgment of Andrews J in *M'Conville* v *Nolan*[2] where the verification was of the amount due (and not of the cause of action) in respect of which the learned judge had held that there was no verification as required in a motion for summary judgment. He said:

> Now, the authority before Andrews J would apply if the paragraph stopped at the words 'the sum of $24.16s'; but it does more than that: it says, 'as per particulars specially

indorsed on the writ of summons herein'. That incorporates the special indorsement, admitted to be sufficient, which I have already read.

That was the position in Ireland and that is the position here as well.

The practice of exhibiting, for example, a copy of the written contract on which the claim is based or the correspondence between the parties or the invoices and delivery orders in a goods sold and delivered case may have some relevance in anticipating a contention that the plaintiffs' claim is not bona fide or some other defence, but is not necessary to meet any requirement of the O 14 procedure. In an O 14 application, the plaintiff is not required to prove his claim. In the instant case, the learned senior assistant registrar would have been justified in giving summary judgment to the plaintiff on the basis of the first affidavit filed in support of the application which had met all the requirements presented by O 14. The contention made on behalf of the defendants at the initial hearing amounted to a submission that the plaintiffs had not proven their claim which, as has been seen, is not required of a plaintiff in an O 14 application.

At the further hearing again, in effect, the defendants were complaining, on this occasion by affidavit, that the plaintiff had not proven its claim. The senior assistant registrar was justified in giving summary judgment and accordingly the appeal had to be and was dismissed with costs.

Appeal dismissed.

Solicitors: *Cheang & Ariff; V Chandran.*

Reported by *Kevin Mathews*

Syarikat Tungaring Kilang Papan Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K596 OF 1988
HAIDAR J
4 AUGUST 1989

Civil Procedure — Injunction — Application to set aside — Serious question to be tried — Balance of convenience — Forest Enactment 1968, ss 4(1), 24(3) & 24(4)(a)

Civil Procedure — Interlocutory proceeding — Cross-examination on affidavit — Rules of the High Court 1980, O 38 r 2(3), O 60 r 4(1)(c)

The plaintiff had been allocated 10,000 acres to take forest produce for two years from 1 January 1985. At the plaintiff's request, a licence was granted over 5,000 acres only until the end of 1985 and it was further allowed to exploit the remaining 5,000 acres until the end of 1986. Subsequently, the plaintiff appealed for an extension of three years on the grounds firstly, that there was a balance of 2,000 acres which remained unworked and secondly, that there were still a lot of logs in the other 8,000 acres. On 8 January 1987, the Chief Minister endorsed the plaintiff's letter of appeal with the remark 'Approved for renewal'. The plaintiff was then informed that it had approval to continue logging the 2,000 acres for one year to the end of 1987. Accordingly, the 5,000 acres stated in the licence was amended to 2,000 acres and the licence was later renewed to the end of 1988. Following the expiry of the plaintiff's rights over the 8,000 acres, the first defendant was granted a permit to exploit this area which they subsequently assigned to the second and third defendants. The first defendant had a licence for the said area until the 24 August 1989. The plaintiff, however, refused the first defendant access to the area and contended that although its appeal for 10,000 acres had been approved by the Chief Minister, the forest officer had failed to issue the plaintiff a licence for the same except for the 2,000 acres. The plaintiff accordingly commenced proceedings for a declaration and obtained an interim injunction on 6 March 1989. The following applications were filed: (i) by the plaintiff, to cross-examine certain deponents on their affidavits; (ii) by the defendants, to set aside the interim injunction.

Held, dismissing the plaintiff's application and allowing the defendant's application:

(1) The application for cross-examination would be dismissed. The authorities tend to show that the courts are slow in granting such an application where the power to do so is discretionary. As the deponents had in their affidavits explained at length the remark 'Approved for renewal' which appeared to be the object of the cross-examination, cross-examining them on this would at most be a repetition of that deposed to. The effect of the remark may properly be a question to be tried in the action.

(2) The injunction should be set aside. There is no serious question to be tried except as to the legal effect of the remark 'Approved for renewal'. There cannot be a contractual relationship between the state government and the plaintiff by the remark which cannot be construed other than that it meant approved in principle, ie subject to other matters being in order. Further, the approval for only 2,000 acres necessarily implies that the plaintiff's 'proposal' to continue logging over 8,000 acres must have been rejected. The plaintiff had also subsequently appealed for an extension over this 2,000 acres to the end